No. 14,499

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL E. PLESHA, JAMES E. MABBUTT and MYRON L. KERN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

WHITE, HARBER & SCHEI,
Bank of America Building, Sacramento 14, California,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

I. THE FACTS.

There is no conflict in the evidence and no dispute as to the facts. A narrative of the essential facts follows.

Plaintiff Paul E. Plesha and Plaintiffs in Intervention James E. Mabbutt and Myron L. Kearn, hereinafter referred to as "plaintiffs" or as "appellants" or as "Plesha" "Mabbutt" and "Kern", are residents of the Northern District of California. This is alleged in the complaints (Tr. pp. 3, 29, 32), admitted in the answers (Tr. pp. 7, 97, 104), and found by the

Court (Finding 29, Tr. pp. 138-139). Each of them entered the Armed Forces of the United States in 1941 and served therein during World War II. (See Answers, Tr. pp. 9, 99, 106; Findings 1, 8 and 14, Tr. pp. 126, 129, 131.) While in the service each insured his life under the National Service Life Insurance Act of 1940. (Public No. 801, 76th Congress, Title VI, 54 Stat. 1008, 38 U.S.C.A. Secs. 801-818.) This also is established by the pleadings. (Tr. pp. 3, 7, 29, 97, 32, 104.)

Before entering the service each had obtained life insurance from California Western States Life Insurance Company. (Answers, Tr. pp. 9, 99, 106; Findings 1, 8 and 14, Tr. pp. 126, 129, 132.) Under these policies there was no personal liability to pay premiums (Exhibits 14, 15, 16 and 17, Tr. pp. 275-287; testimony of Marcus Gunn, Tr. pp. 219-222) or to repay policy loans (same Exhibits, Tr. pp. 275-287; testimony of Marcus Gunn pp. 224-225; Finding 22, Tr. pp. 135-136). After entering the Army, each made application to bring such insurance under the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (Public No. 861, 76th Congress, 54 Stat. 1183-1186) and these applications were accepted by the United States, Plesha's and Mabbutt's in 1941 and Kern's in January, 1942. (Answers, Tr. pp. 9, 99, 106-107; Findings 1, 8 and 14, Tr. pp. 126, 129-130, 131-132.)

Appellants did not thereafter pay the premiums on such insurance but by reason of being under the protection of said Civil Relief Act, their policies did not

lapse. Instead, the insurance company reported to the United States, as they became past due, the premiums on each protected policy. These reports were made on so-called "Monthly Difference Reports", following receipt of which the United States issued interest-bearing certificates to the company promising payment of the "difference" shown on such reports. (Testimony of Glenn E. Drummond, Tr. pp. 186-196, 234-236; Exhibits 6 and 13, Tr. pp. 261-267, 274.)

Following amendment of Article IV in 1942 (Public Law 732, 77th Congress, 56 Stat. 773-776, effective October 6, 1942) the insurance company, as was its right under Section 408(2) (50 U.S.C.A. App. Sec. 548(2)) of such amendments, elected to give up the certificates which had been issued to it, and the "Monthly Difference" reporting system, and to accept in lieu thereof the method of settlement and the guarantee of premiums prescribed by such amendments. (Tr. pp. 187-188, 196-197; Finding 20, Tr. p. 135.)

Appellants were not consulted concerning such election, nor were they then advised of it, nor did they then consent to any change in the relationship between themselves, the company and the United States. (Request for Admissions 4 and 5 and Replies thereto, Tr. pp. 35-36, 38; Finding 27, Tr. p. 137.)

After appellants were separated from service the United States sent each of them a form letter (FL 9-63) advising that his policy could be withdrawn from protection and stating that if he did not pay the premiums which had accrued during the period of pro-

tection he would owe the United States whatever the United States might pay the insurer. The letter to Plesha was sent about 13 months after his separation, the letter to Mabbutt about 12 months after his separation, and the letter to Kern about 4 months after his separation. (Exhibit A, Tr. pp. 287-289, Exhibits G and H, not in printed transcript; Answers, Tr. pp. 10, 100; Finding 2, Tr. pp. 126-127.) Plesha and Kern took no action on receipt of such letters. Mabbutt wrote to the Veterans Administration requesting termination of protection and this was accomplished some 14 months after his separation. (Answers, Tr. pp. 10, 100, 107; Findings 3, 9, 10 and 14, Tr. pp. 127, 130, 131, 132.)

Each appellant allowed his insurance with California Western States Life Insurance Company to lapse, and in due course the United States was called upon to make good on its promise to pay the premiums which had come due during the period of protection, together with 6% compound interest thereon, and it did so. The amount so paid on account of Plesha's policy was \$261.05, on account of Mabbutt's \$205.75, and on account of Kern's \$332.06. (Answers, Tr. pp. 10-11, 100-101, 107-108; Findings 3, 9, 13, and 15, Tr. pp. 127, 130, 131, 133.) Thereafter the United States demanded of each appellant that he repay to it the amount it had paid the insurance company. Plesha made partial payment in the amount of \$40.00 and Kern paid \$30.00 in accordance with such demand. Mabbutt made no payment. (Answers, Tr. pp. 11-12, 101, 108; Exhibit B, Tr. pp. 297-304; Findings 4, 10, 16 and 17, Tr. pp. 127, 128, 130-131, 133-134.) In 1950

dividends became payable to appellants on their National Service Life Insurance. (Answers, Tr. pp. 7-8, 97-98, 105; Findings 5, 11 and 19, Tr. pp. 128, 131, 134.) The United States deducted therefrom the amounts it had paid to the insurance company, and paid the balance of such dividends by check. (Plesha thus received \$12.70, Mabbutt \$146.25, and Kern \$93.94. Answers, Tr. pp. 9, 99, 106; Findings 5, 6, 12, 19 and 21, Tr. pp. 128-129, 131, 134-135.)

Appellants then brought suit for the balance of their dividends under Section 617 of the National Service Life Insurance Act of 1940 (38 U.S.C.A. § 817), alleging claim therefor, partial denial thereof, and disagreement as to the difference. Plesha sued for \$221.05, Mabbutt for \$205.75 and Kern for \$302.06, with interest thereon from the dates the deductions were made. (Complaints, Tr. pp. 3-6, 28-34.) The United States answered, denying jurisdiction, and claiming on the merits that it had paid the dividends in full, partly by offsetting the alleged obligation to reimburse and partly in cash. As indicated above, the facts pertaining to this defense of payment are set forth in some detail. (Answers, Tr. pp. 6-13, 96-109.)

II. STATEMENT OF THE CASE; THE ISSUES INVOLVED.

The trial Court denied appellants' claims for the balance of dividends due them on their policies of National Service Life Insurance. The denial of such claims was based on a conclusion that each appellant owed the United States the amount which had been

deducted from his dividend. This conclusion, in turn, was rested on the fact that the United States had been required to pay the amounts in question to an insurance company in accordance with obligations assumed by the United States under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (Public No. 861, 76th Congress 54 Stat. 1183, 50 U.S.C.A. App. Sec.s 540-554) in connection with the protection of life insurance issued to appellants by such company, and on the holding that appellants are obligated to reimburse the United States for such payments. The Court also held that the United States was entitled to offset the debt thus found to exist against the National Service Life Insurance dividends.

More specifically the decision below raises the following questions:

1. Does the Court have jurisdiction?

2. As stated by the trial Court: "The central question of this litigation is whether the Relief Act of 1940, as originally enacted, imposed on service men who put their private life insurance policies under the protection of That Act, a liability to repay the defendant for whatever the latter might have to disburse to the insurance companies under that statute." (Tr. p. 116.)

3. If such a liability was imposed, what was the measure of that liability: To reimburse the United States for the amount it would have paid on account of the protection of the particular policy if the United States had settled with the insurance company in accordance with the terms of the 1940 Act; or to

repay the greater amount which the Government actually paid the company in accordance with the terms of the 1942 amendments?

4. Did the 1942 amendments to said Act extend the period of protection of policies placed under protection before the enactment of such amendments?

5. Assuming that the 1940 Act imposed on each appellant the obligation to reimburse the Government for the amount which it might pay on account of the protection of his policy in accordance with the terms of that Act, could the 1942 Congress, without violating the Fifth Amendment to the Constitution of the United States, increase the burden of that obligation without his consent by increasing the amount which the Government would pay to the insurance company and requiring him to reimburse the Government for such larger payment?

6. Was the United States entitled to collect, by way of offset against appellants' National Service Life Insurance dividends, the amounts it did deduct from such dividends?

Many other questions, subordinate to the above, will appear as the analysis of the case develops.

III. SPECIFICATION OF ERRORS.

The answers, express or implied, of the Trial Court to the questions just stated were as follows:

1. It had jurisdiction.

2. The liability was imposed.

3. The measure of the liability was the amount the Government actually paid the company.

4. (Impliedly) The 1942 amendments extended the period of protection for previously protected insureds.

5. (Impliedly) There was no violation of appellants' rights under the Constitution.

6. The United States was entitled to offset in the amounts deducted.

This appeal challenges each of these holdings, excepting the one relating to jurisdiction, and we assign as error the conclusions reached on Questions 2 to 6, inclusive.

IV. JURISDICTION OF THE COURT.

Appellants' complaints rely for jurisdiction on Section 617 of the National Service Life Insurance Act of 1940, as amended (38 U.S.C.A. Sec. 817). This section, and pertinent portions of 38 U.S.C.A. 445, to which it refers, are set forth in Appendix A. Read together the two sections give jurisdiction to hear suits on any claim under the Act provided there be "disagreement as to claim, including claim for refund of premiums, under a contract of insurance". The term "claim" is defined to include any writing which shows "an intention to claim insurance benefits", and the term "disagreement" means a denial of the claim by the Administrator or someone acting in his behalf. Jurisdiction runs to the District Court in the district in which any claimant resides.

The Court below held that it had jurisdiction. In accord is *Morton v. United States,* 113 F. Supp. 496. Contra on the question of what is included within the term "insurance benefits" as used in Section 445, but distinguishable here, is *Candell v. United States,* 189 F. (2d) 442.

We will not attempt to add to the trial Court's discussion of the *Candell* case and the meaning of the term "insurance benefits" (123 F. Supp. at 595-596; Tr. pp. 112-116). However, we do wish to point out that, in addition to the "insurance benefits" clause, Section 445 contains other language which confers jurisdiction to hear this type of suit. The opening language of the Section is:

> "In event of disagreement as to claim, *including claim for refund of premiums . . .*" (emphasis added)

As pointed out by the Court in the *Candell* case (189 F(2d) at 444), payment of a dividend on a life insurance policy is a return of premium or a refund of the unearned portion of premiums previously paid. Therefore, appellants' claims for these dividends were claims for refund of premiums, and it is unnecessary to decide whether or not a dividend is an "insurance benefit".

When the Government paid only part of the dividend in cash and exercised its claimed right of offset against the balance, it denied the claim as to such balance, thus creating a "disagreement". That payment of part of what is claimed is a denial as to the balance is established by the case of *Biven v. United States,*

142 F. (2d) 570, where payment of a lesser amount of insurance than was claimed was held to constitute a "disagreement".

Hormel v. United States, 123 F. Supp. 806, found jurisdiction to hear a similar suit for the balance of National Service Life Insurance dividends in 28 U.S.C.A. Section 1346. While jurisdiction is here founded on a different statute, this observation of the Court is as pertinent here as there:

> ". . . Further, the Government's construction as applied to this case raises the serious question whether the Fifth Amendment would not invalidate a law which would permit the Government to recover a judgment against a citizen without giving him an opportunity to challenge the bare assertion of an administrative officer that money was due and owing." (123 F. Supp. at 810.)

V. ANALYSIS AND ARGUMENT.

The judgment here attacked is one of five which have considered the "central question" stated above. In accord, and cited by the trial Court are *United States v. Nichols* (D.C.N.D. Iowa), 105 F. Supp. 543, and *Morton v. United States* (D.C.E.D. N.Y.), 113 F. Supp. 496. So far as can be ascertained neither of these two cases considered Questions 3, 4, 5 or 6, as listed above.

Contra, and fully supporting our analysis of the 1940 Act, is *Hormel v. United States* (D.C.S.D. N.Y.), 123 F. Supp. 806. Also contra, but giving different

reasons for declining to follow *Nichols,* is *United States v. Hendler* (D.C.D. Colo.), 123 F. Supp. 383.

A. SUMMARY OF APPELLANTS' POSITION.

The Civil Relief Act of 1940 did not expressly impose the liability in question, nor can such a liability be implied from the provisions of that Act. Our position in this regard has been summarized by Judge Dimock in the *Hormel* case:

> "... Since there is nothing expressed in the statute permitting any recovery by the Government against those insured, any right of recovery must be based on implication. Any implication of the right to such recovery must be grounded upon the position of the Government as a guarantor who has made good upon its guarantee. In such case, the guarantor is entitled to recover over from the principal obligor the amount which the guarantor has been required to pay. Here, however, as plaintiffs point out, there is no way of determining under the provisions of the 1940 Act how much of the total which the Government is required to pay is payable for the account of any particular one of those insured. This seems to me to establish plaintiff's position that these insured are under no obligation to reimburse the Government in the amount sought or in any other amount.
>
> "The fact that Congress omitted to provide a plan under which the amount of any recovery from the insured might be computed demonstrates that Congress did not intend that there should be any recovery from the insured.

> "The structure of the 1940 Act does not provide for payments by the Government in satisfaction of the premium liability of each insured but rather a lump sum payment to the insurer. This is not a merely verbal difference. The lump sum settlement provided for is an amount which differs from the total that would be recovered if the Government should succeed in recovering in every case what it here seeks." (123 F. Supp. at 811-812).

Under the 1942 amendments to the Act the method of settlement between insurance company and Government could be changed at the company's election, increasing the amount the Government could be called on to pay. The Government's attempt to apply this new payment formula as a measure of the insured's "liability" increases that liability beyond the maximum that the 1940 Act could be considered to have imposed. We believe that any such attempt to increase the burden of an obligation without the obligor's consent would be unconstitutional.

So that this Court may weigh the soundness of these conclusions we shall examine in detail the provisions of the 1940 Civil Relief Act, the 1942 amendments thereto, and the Legislative history of both enactments. We shall also find support therefor in the early administrative construction of the 1940 Act.

We believe that the arguments advanced in support of the Government's position are unsound, and we shall attempt to demonstrate their incorrectness.

We shall also give careful attention to the equities of the situation. In this connection we will claim

that the conduct of the United States in the premises has been such as to estop it from asserting the liability it attempts to assert here.

We believe that even if some liability exists, 38 U.S.C.A. § 454a precludes the use of offset here; and further contend that in any event the Government has not sustained the burden of proving how much it has coming from appellants.

B. ANALYSIS OF THE CIVIL RELIEF ACT OF 1940.

1. Summary of Provisions.

The Act is divided into six Articles. Article IV deals with the protection of private-company life insurance. It attempts to preserve the life insurance of men called into the service by prohibiting the lapse or forfeiture of that insurance for nonpayment of premiums. In its effort to preserve property rights despite service-connected inability to meet obligations thereon Article IV is much like the rest of the Act. However, Article IV does differ basically from all of the rest of the Act in its indemnification provisions, obligating the United States to pay if the serviceman does not.

The full text of Article IV is attached as Appendix B. Throughout this brief when we refer to sections of the Act by number we will use the section numbers found in the Act itself (Article IV comprises Sections 400 to 414 inclusive) rather than to the Code where Article IV was 50 U.S.C.A. App. Sections 540 to 554 inclusive.

Article IV provides that any person in military service who had held private-company life insurance for at least thirty days before entering the service could apply for the protection of such insurance having a face value of $5,000.00 or less. The application was to be sent by the insured to the insurer, and a copy of the application was to be sent to the Veterans' Administration. (§§ 401, 402.) The Veterans' Administration was to approve or reject the application and give notice of its action to the insured and the insurer. (§§ 403, 404.)

No policy which was in force before the insured entered military service and which had been bought within the benefits of Article IV was to "lapse or be forfeited for non-payment of premium during the period of such service or during one year after the expiration of such period" provided that in no event would such protection continue more than one year after the Act itself ceased "to be in force." (§ 405.)

The insurer was to make a monthly report to the Veterans' Administration showing the unpaid premiums which came due during the month covered by the report, payments made during the month on premiums previously listed as being in default, and the difference between the total amount of defaulted premiums therein reported and the payments made on previously reported defaulted premiums. (§ 406.) If any protected insured died while in military service "the amount of any unpaid premiums with interest at the rate provided for in the policy for policy loans shall be deducted from the proceeds of the policy and

shall be included in the next monthly report of the insurer as premiums paid." (§ 409.) After checking the monthly report the Veterans' Administration was to issue a certificate to the insurer for the amount of the monthly difference. Such certificate was to bear interest at the rate to be prescribed by the Secretary of the Treasury (the rate later was set at 3%. 38 Code Fed. Reg. 10.3312—old section number from 1941 Supp. to C.F.R.; Finding 23, Tr. p. 136). Insurers were to hold certificates "as security for the payment of the defaulted premiums with interest". Certificates were to be payable sixty days after approval of a final settlement of account between the Government and the insurer which final statement was to be had "one year after the date when this Act ceases to be in force . . ." (§§ 406, 407, 408, 411).

If the insured did not within one year of the termination of his military service pay to the insurer all past due premiums with interest thereon at the policy loan rate, the policy would lapse and the insurer would become liable to pay the cash surrender value thereof. (§ 410.) One year after the termination of the Act there was to be an account stated between the insurer and the United States, the insurer being credited with the total amount of certificates with accrued interest thereon to the date of the account and the Government being credited with the cash surrender value of each lapsed policy up to but not exceeding the unpaid premiums plus interest thereon at the policy loan rate. The balance in favor of the insurer was to be paid by the Secretary of the Treasury. (§§ 411, 412.)

The following appeared in Section 408:

> ". . . To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained."

The Veterans' Administration was to prepare forms and regulations and was ordered to notify military personnel of the provisions of Article IV and explain it to them. (§ 401.)

2. Silence of Act on Liability Question.

We have seen that the original Article IV contained a rather elaborate scheme for determining how much the Government was to pay to each insurance company, and that it provided in detail for the time and manner of final settlement of accounts between Government and company. The Act *did not say* that servicemen were to repay the Government for amounts paid by it to insurers. There is no provision like that found in Section 406 of the 1942 amendments. There is no requirement that the insured sign a premium note. There is not one word that tells us how to calculate the amount any one serviceman might have to repay, or that tells us when or how or to whom any such repayment was to be made. The silence of the Act on these matters, especially when contrasted with

the very specific provisions concerning the manner in which the Government's liability was to be computed and paid, leave us wondering how Congress could have intended to impose a liability on the serviceman and yet fail to define that liability better than it did.

3. Operation of the Monthly Difference System.

Significant as this Congressional silence may seem, we do not need to rest our case on what Congress did *not* say. What it *did* say is even more significant. The amount that the Government might eventually be called upon to pay a particular insurer was the *difference* between all credits and debits on a running account covering *all* protected policies of that insurer, plus simple interest at 3% per annum. In other words, the Government's obligation was to be measured by the aggregate experience of groups of policyholders. The mechanics of the system of accounts to be had between insurance companies and the Government were such that items relating to individual insureds became submerged in the group account to an extent that it would have been impossible to determine what the Government had paid on account of any one protected policy. Let us demonstrate why this was so.

When a protected policyholder died during the period of protection the amount of any unpaid premiums plus interest at the policy loan rate (6% compound in the cases of these plaintiffs, and more than 3% throughout the insurance business, Tr. pp. 225-227) was deducted from the proceeds payable to the beneficiary and credited to the favor of the Government on the next Monthly Difference Report. So,

due to the difference between the 3% simple interest which had been accruing on the unpaid premiums and the 6% compound interest which was credited to the Government on the Monthly Difference Report, that credit would be larger than the total amount, including interest, which had been charged against the Government on that policy; *and* on the final accounting between the Government and the insurer the "profit" that the Government had made on each death case would reduce the amount the Government had to pay the insurer to something *less than* the total of unpaid premiums on policies that were allowed to lapse after protection plus 3% simple interest on such premiums.

Likewise, if any insured reinstated his policy by paying the premiums which had accrued during the period of protection the Government would have received a credit for the unpaid premiums plus interest at the policy loan rate (§ 410 of Act; 38 Code Fed. Reg. 10.3313—old Section number, from 1941 Supp. to C.F.R.), and since all companies were charging more than 3% on policy loans, the Government would have profited on each reinstatement.

Still further, if any protected policy, at the time of final settlement, had a cash value which exceeded the unpaid premiums plus 3% interest thereon, the Government would profit because under Section 411 it was entitled to credit out of cash value up to the amount of the unpaid premiums plus interest at the policy loan rate.

A simplified example, illustrating how these factors would affect the Government's liability, is attached as Appendix C.

4. The Measure of the Obligation to Reimburse.

Assuming for the moment that the 1940 Act did impose on appellants and others in the same position an obligation to reimburse the Government, it seems axiomatic that the measure of the obligation of each insured would be the amount which the Government had laid out on account of the protection of *his* insurance.

In its briefs below the United States did not agree; it claimed that the 1940 Act made each protected insured liable for unpaid premiums plus interest at the policy loan rate. In some places the Government claimed that this liability ran to the insurance company, in others it claimed that the liability ran to the Government. Of course the Act does not *say* that the insured is obligated to repay premiums plus interest at the policy loan rate, nor indicate to whom such obligation runs. Because of the silence of the Act, the Government and the Court below rely on common law theories of subrogation and reimbursement of guarantors to fasten a liability upon appellants and others in like position. But—the limit of the rights of a guarantor to recover from the principal obligor is the amount laid out in his behalf. (See 50 Am. Jur. 760, Subrogation § 119; 50 Am. Jur. 1068, Suretyship § 251.) The Government, forced to rely on an implied obligation to reimburse, cannot claim more than full reimbursement. But that is just what it is trying to do here. It asks appellants for an amount equal to unpaid premiums plus interest at 6% per annum, compounded annually, when the most it could have laid out under the 1940 Act (even without credits

from "profits" realized on death claims, reinstatements, etc.) was unpaid premiums plus 3% simple interest.

The opinion in the *Hormel* case (123 F. Supp. at 814-816) gives examples of how the Government's theory would have worked out in practice. In one example the serviceman would have been obligated to pay the Government where the Government had not been required to pay out a penny on the policy involved!

While Congress *could* have enacted a law expressly providing for results such as the Government contends for, the fact is that it didn't. What is more we find it impossible to believe that Congress *would* have enacted a law where the Government could collect more from each insured than it had laid out on his behalf.

5. Conclusions.

We have demonstrated that:

(1) The amount that the Government would have been required to pay to each insurance company on final settlement would have been a balance struck from a running account covering all protected policies of that insurer;

(2) Deaths, reinstatements and payments out of cash value would have reduced the total Government payment to the insurer on account of lapsed policies;

(3) The *limit* of any liability imposed on each appellant by the 1940 Act would be the amount laid out on his behalf by the Government;

(4) The *amount* of the liability (if any) of any one serviceman to repay would have been affected by what happened to each of the other protected policies of his insurer; and

(5) It would have been difficult if not impossible to compute the "debt" of any one insured, even assuming a formula for doing so could be supplied where Congress did not supply it.

In the light of these facts is it reasonable to suppose that Congress, anticipating the necessity of settlement between the Government and individual servicemen, would have adopted a statutory scheme where it would be so difficult to determine individual liability, or that it would have failed to supply some formula for determining the amount owed or to specify when or how or to whom the "debt" was to be paid? When we compare the elaborate provisions for settlement between Government and insurance company, the answer seems obvious. The absence of any machinery to effectuate repayment from insureds shows that Congress did not intend and did not contemplate that insureds would be called upon for repayment.

Beyond all this, the Act speaks positively on the matter of what happens if the United States is called upon to pay. In Section 408, "To indemnify it against loss" the United States is given a *lien* on protected policies. This much the Congress required for the protection of the Government—this much *and no more.* Here was the place to require payment if repayment was to be required. The possibility of financial loss to the government was not overlooked—it was here

considered and provided for *to the extent that Congress then desired to provide for it. Expressio unius est exclusio alterius!*

C. ANALYSIS OF THE 1942 AMENDMENTS.

Analysis of the 1942 amendments to the Soldiers' and Sailors' Civil Relief Act throws further light on the intent of Congress in 1940. Such analysis is also necessary to answer the question of whether Congress intended to increase the burdens of any "contract" to repay previously entered into, and whether Congress *did* increase any such burden.

1. Summary of Provisions.

The amendments (56 Stat. 773, 50 U.S.C.A. App. Sec. 540-548) were extensive. Article IV was completely rewritten, and the whole scheme of insurance protection was substantially changed. The text of the amended Article IV is attached as Appendix D. Again we will take section numbers from the Act rather than from the Code.

The amount of protectible insurance was increased to $10,000.00. (§ 401.) The period of protection was lengthened to extend for two years after the insured left the military service. (§ 403.)

The Government now "guarantees" payment of premiums on each *individual* policy, plus interest *at the policy loan rate,* and will make the guarantee good when the period of protection of that policy ends. (§ 406.)

Policies protected under the original Act continue to be entitled to protection thereunder and the provisions of that Act remain in full force and effect as to all policies where protection was applied for before the amendments (§ 408(1)) but the insurer is given the option of surrendering all certificates issued under the original Act and settling on the basis of individual policies in the mode provided in the amendments. (§ 408(2).) There are now specific provisions that the insured shall be indebted to the Government for amounts paid by it to the insurer, and that the Government may offset such debt from any amount due the insured by the Government. (§ 406.)

2. Increase in Government Payments and in Asserted Liability.

The amount which the United States deducted from the appellants' dividends was the amount which it was required to pay under the 1942 amendments, an amount substantially *greater* than it would have been required to pay under the 1940 payment formula, and an amount substantially greater than the maximum obligation which could be said to have been imposed on appellants by the 1940 Act under the theory of a common law obligation to reimburse the guarantor.

The increase was mainly due to two factors, (1) the increase in the interest rate paid by the Government from 3% simple to interest at the policy loan rate, and (2) the extension of the period of protection from one to two years after termination of service. In addition, substituting the 1942 method of calculation for the 1940 method caused the insureds to lose the benefit of applying the Government's "profit" on certain

policies against the supposed liability of the remaining insureds.

3. Extension of the Period of Protection.

The matter of extending the period of protection and the effects of doing so call for some discussion. In the first place it is doubtful that Congress intended to extend the period for policies already under protection. Section 403 (as amended in 1942) does not by its terms apply to policies already under protection. And Section 408(1) says that policies already protected are still governed by the provisions of the original Act. In the second place, the "extension", if it occurred, was accomplished without the knowledge or consent of plaintiffs and others whose policies were protected before the amendments.

4. Conclusions Inferable From Amendments.

What light the 1942 amendments throw on the intent of Congress in 1940, and whether the 1942 Congress intended to increase any liability imposed by the 1940 Act, are questions so interrelated that they will be here discussed together.

The wording of Section 406 is significant:

> ". . . The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, *as amended,* shall become a debt . . ." (Emphasis added.)

Here is the indebtedness provision which the Government says shows Congressional recognition that a liability to repay was imposed by the 1940 Act. Does it show that? No! The indebtedness provision of the

1942 Act is expressly limited to applications approved under the Act *as amended.* The natural implication from this is that there was no indebtedness on account of applications approved *before* the amendments.

Section 408 seems even more decisive. Its two subdivisions make a basic differentiation between the rights and obligations of insureds who applied for protection before the amendments, and the rights of insurance companies as to such previously protected policies. The provisions of the old Act "remain in full force and effect" so far as the insureds are concerned; but the insurance companies are given the option, *whether or not their insureds agree,* to settle with the Government on the basis of individual policies—a greatly simplified method which has the added advantages of bringing them more interest and quicker payment. It is impossible to reconcile Section 408(1) which says the rights and obligations of the insured are unchanged, with a requirement that the insured pay the Government what it paid the insurance company under the new, increased, 1942 payment formula.

Further, if the Government's position here is correct it means that the 1942 Congress gave the insurance companies uncontrolled discretion to increase the "liability" of each of their insureds to the Government, and also gave these companies strong inducements to do just that. Is it reasonable to assume that Congress intended to put such power in the hands of these companies with complete disregard for the rights and feelings of the very servicemen it was trying to protect? Or is it more reasonable to assume that

Congress was not concerned with what effect the insurance companies' election would have on individual servicemen because there would be no effect, there being no liability to repay in the first place?

Still further, we feel sure that the 1942 Congress had no idea of going to the men whose policies were already protected and telling them that Congress had modified their contracts, unilaterally and without their consent, increasing the burdens thereof as the price of continued protection. It is unthinkable that Congress would attempt to increase such burdens *without* telling the servicemen involved what had been done and giving them a chance to withdraw.

5. Comparison of Claimed Liability With Maximum Liability Under 1940 Formula.

In an effort to show the difference between using the 1942 formula as the measure of appellants' supposed liability and using each appellant's proportional share of the amount the Government would have paid under the 1940 Act formula we introduced our Exhibits 7, 8, 9, and 10. (Tr. pp. 268-271.) A summary of these exhibits is attached as Appendix E. Due to the various uncertainties involved (e.g. when the final settlement under Section 411 would have taken place; the amount by which the Government's final payment would have been reduced by "profits" from other policies; etc.) it is impossible to establish this difference with exactness. However, by eliminating credits from "profitable" policies from our computations, it may be demonstrated that the difference as to Plesha was *at least* \$57.94, as to Kern \$125.87 and as to Mabbutt \$21.55. This is the difference between the liability

actually claimed by the Government (Column 1 of the Summary) and the maximum amount the Government would have been called upon to pay the insurance company if January 25, 1949, had been the final settlement date and only the one policy had been involved. (Column 4 in the Summary.) January 25, 1949 is used because that was one year after the date set for expiration of the Civil Relief Act under Section 604 of that Act (50 U.S.C.A. App. Sec. 584) and Section 4 of the War Powers Act of 1947 (Pub. Law 239, 80th Congress). If instead we take the difference between the amount here claimed by the Government and the Government's maximum obligation to the company on the particular policy on a date one year after the termination of the insured's military service (Column 3 in the Summary) the difference for Plesha is $75.18, for Kern $169.80 and for Mabbutt $34.69.

Any attempt to take into account the effect on the liability of each appellant of the deaths of protected insureds of California Western States Life Insurance Company (there were eight such deaths, Tr. pp. 228-231; see Exhibit 12, Tr. p. 273), the reinstatements of protected policies of that company (there were 38 such reinstatements, Tr. p. 212; Finding 28, Tr. p. 137), and the application of cash values in excess of unpaid premiums would require the use of an electronic computer.

The uncertainties and difficulties involved in trying to determine how much appellants would have had to pay if liable under the 1940 Act is a further indication that Congress did not intend to impose any liability to repay.

D. LEGISLATIVE HISTORY.

1. General observations.

Where the meaning of a statute may be ascertained by analysis of the language of the statute itself there is no need to resort to extrinsic aids to interpretation, such as legislative history and administrative construction. In such a situation such aids are of little, if any value. See generally 50 Am. Jur. 204-218, Statutes §§ 225-230.

We have shown that this is *not* a case of Congressional *silence,* but a case where the language used in the statute indicates with reasonable certainty that Congress did not intend to require reimbursement. While legislative history and administrative construction are of limited importance in a situation like this, they do not contradict, but rather confirm our position here.

2. The 1918 Act.

During World War I Congress passed a Civil Relief Act (Public No. 103, 65th Congress, 40 Stat. 440) which had insurance protection provisions much like those which appeared in the 1940 Act. Like the 1940 Act, the 1918 Act was silent so far as any obligation of servicemen to repay the Government was concerned, the only specific provision on the subject being Section 409 which contained the identical provisions giving the Government a lien on the policy which were placed in Section 408 of the 1940 Act.

The only pertinent item of legislative history is H. R. Report No. 181, 65th Congress, 1st Session, to

accompany H. R. 6361 (which became the 1918 Civil Relief Act). This report contains this language:

> "Just what the Government's financial burden will be can be little more than a guess, but it is plain that it will not be large.
>
> "In the first place the Government only guarantees the payment of the premiums. If the soldier dies the insurance company will get its premiums out of the policy and the Government's guaranty will not be called upon. If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse the Government will be subrogated to *his* rights." (Emphasis added.)

Note that the Government will be subrogated to the insured's rights under the policy, not to whatever rights the insurer might have to collect from the insured. This indicates that Congress was looking no further than a partial reduction of the Government's "financial burden" through realizing on values inhering in the policy itself. The further discussion of the size of the Government's ultimate liability and the value of "this right of subrogation" which follows immediately after the quoted portion of the report contains no hint that the Government could or would attempt to obtain reimbursement from the servicemen involved.

3. The 1940 Act.

House Report No. 3001 and Senate Report 2109, 76th Congress, 3d Session, state that if the protected serviceman does not pay up the unpaid premiums within one year after separation the policy lapses and

the cash surrender value accrues to the Government to the extent necessary to meet the cost of the premiums which it has guaranteed.

The liability question was not touched on the floor of the Senate. (See Cong. Rec. 12837.) In the House an interchange between Mr. Voorhis and Mr. Arends took place. (Cong. Rec. 13125-13133.) This is mentioned in the *Nichols* case. (105 F. Supp. at 553.) Analysis of what was said discloses that Mr. Voorhis was uncertain as to the meaning of the Act and was asking questions about it, and that Mr. Arends' answer was so inaccurate that it must have confused rather than clarified congressional thinking.

4. The 1942 Act.

Apparently there was considerable dissatisfaction with Article IV of the 1940 Act, for as early as April 16, 1941 the Administrator wrote to the President of the Senate proposing various amendments "to substitute a more workable law". This letter, appended to Senate Report No. 716, 77th Congress, includes the following statement:

> "It is believed that the proposed amendment, if enacted, . . . will eliminate the possibility of requiring the government to pay premiums on insurance which the insured does not intend to carry except during his period of active service, and will considerably lessen the administrative cost in carrying out the provisions of the article as now enacted."

Bills to effectuate changes in the Act were introduced in both houses (S. 1372 and H. R. 4546) in

April 1941. The development of the indebtedness provision in S. 1372 is most interesting. Originally it was

> ". . . The amount paid by the United States to the insurer* shall become a debt due to the United States by the insured . . ."

On May 16, 1941, according to Administrator's Decision No. 742 (Tr. p. 75), the words "on account of applications made subsequent to approval of this Act" were inserted at the point marked with an asterisk.

In October Senate Report No. 716, offering an entirely new draft of Article IV, inserted at the point marked with the asterisk: ". . . on account of applications approved under the provisions of this Article, as amended." The difference between the words inserted in May and those inserted in October is purely verbal; there would be no object in adding anything like this to the original bill unless it was intended to limit application of the provision to subsequent applicants.

S. 1372 was passed by the Senate on November 10, 1941, with no further changes in Section 406, which then contained the exact language which ultimately was enacted in October 1942. This November 1941 version of Article IV also included Section 408(1) which kept the 1940 Act in full force and effect as to policies previously protected.

A new bill, H. R. 7029, containing a repayment provision like that adopted by the Senate, was introduced in the House. In the course of hearings thereon

before the Military Affairs Committee, Mr. Breining, the Veterans' Administration Representative, was asked by the Chairman:

> "Q. How are the premiums paid on the existing $5,000? Does the insured pay half and the Government pay half, or does the insured pay all of it?
>
> "A. (by Mr. Breining). The insured is liable for all the premiums of the $5,000 policy, the Government acting really as a guarantor. However, if there is a default, there would not be any liability for the whole amount in excess of the cash value under the present construction of existing law." (Hearings before House Military Affairs Committee, May 25, 1942, p. 38.)

Leaving aside for the moment the significance of this statement so far as administrative construction is concerned, we note here that Congress is being told by the top insurance man in the Veterans' Administration that the protected serviceman is not liable to reimburse the Government "under present construction of existing law."

After these hearings H. R. 7164 was introduced on June 1, 1942 (Cong. Rec. 4785) and was passed by the House on June 18, 1942. (See Cong. Rec. 5363-5372.) This bill had *no provision* making the insured indebted to the Government for amounts paid by the Government to his insurer, although, as seen above, H. R. 7029, on which the hearings were held and S. 1372 *did* have such a provision. This is not inaction, this is not silence. This is the *elimination* of an unwanted provision from a law which would govern

future transactions. The Senate insisted on its version of Article IV, including the indebtedness provision (Cong. Rec. 6707) and the bill went to conference.

After conference, the managers on the part of the House in House Report 2481 stated, *inter alia*:

> "Under the House bill, any amounts paid by the United States to an insurer on account of approved applications *do not become a claim* against the owner of the policy. The Senate Amendment (sec. 406) *made* such payments a debt due to the United States and authorized collection by deduction from any future amounts due the insured by the United States. The conference agreement retains the Senate provision." (Emphasis added.)

The bill agreed upon in conference became law on October 6, 1942.

The 1942 legislative history tells us that the two houses of Congress were in *disagreement* as to whether liability to repay should be imposed with regard to policies already protected thereafter, but were agreed that policies already protected should continue to be governed by the original Article IV. Was the 1942 Congress seriously considering giving "free insurance protection" to subsequent applicants while holding those already protected liable to repay? We think not. Further, and perhaps even more significant, the language added to the original draft or Section 406 and the language at Section 408 (1) seem almost conclusive evidence of an intent to restrict the indebtedness provision to future applicants.

E. ADMINISTRATIVE CONSTRUCTION.

1. Regulations, Forms and Explanation to Armed Forces.

Immediate administrative construction of the Civil Relief Act of 1940 was made necessary by Section 401 which required the Administrator of Veterans Affairs to prescribe regulations, prepare and furnish forms, and "issue through suitable military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions" of Article IV.

The original Regulations (38 Code Fed. Reg. 10.3300 et seq., 1941 Supplement to the Code of Federal Regulations, pp. 3514-3520; see Answer to Interrogatory No. 4, Tr. p. 17) are silent on the subject of repayment. R. 3310, which paraphrases Section 408 of the Act, and R. 3314, which paraphrases Section 410 of the Act, are about all that can be found which have any direct bearing. There is nothing remotely resembling a statement that the serviceman is under any liability.

The official statement to the Armed Forces (V.A. Insurance Form 385; see Answer to Interrogatory No. 5, Tr. pp. 17-18; Finding 25, Tr. p. 136) under the headings "Indemnity", "Maturity" and "Settlement" paraphrases the Act and emphasizes the fact that the Government looks to the security of the policy for its protection. Again *nothing* is said which gives the slightest hint that the Act imposed any obligation to reimburse.

The prescribed forms (V.A. Insurance Forms 380, Application for Benefits, and 394, Notice of Approval,

copies of which appear in Defendant's Exhibits A, G and H, printed in part, see Tr. pp. 291-293; see also Finding 24, Tr. p. 136) contain positive language as to what consequences would follow if the insured did not pay the premiums within a year after leaving the service. Personal liability is not one of the enumerated consequences. If the responsible officials thought or had any idea, that a personal liability to repay had been imposed by Congress it was their duty to so draft these forms, especially Form 380, as to make clear and certain the Government's right to such reimbursement.

2. Statements of Veterans' Administration Officials.

Shortly after the Act became law, insurance companies and others made inquiries of the Veterans' Administration concerning the very question which concerns us here.

Harold W. Breining, then Assistant Administrator for Insurance and head of the Government's whole insurance program is quoted in the January 31, 1941 issue of the Eastern Underwriter, an insurance trade magazine, as follows:

> "There is no provision in the Act at this time for collecting from the insured the amount that the premium with interest may exceed the cash surrender value at the time of termination." (Answers to Interrogatories 7 and 27, Tr. pp. 19, 45-46; Finding 26, Tr. pp. 136-137.)

On February 21, 1941, Mr. H. L. McCoy, then Director of Insurance for the Veterans' Administration, in reply to a question from a Mr. Peters of the Jeffer-

son Standard Life Insurance Company asking whether the protected serviceman could be "embarrassed by the Government" if he let his policy lapse, said this:

> "There is no provision in the Act whereby the Government may be reimbursed by the policyholder in the amount paid to the insurer in those cases where there was no cash surrender value or where such value was insufficient to cover the indebtedness." (Answers to Interrogatories 8 and 28, Tr. pp. 19-20, 46-47; Finding 26, Tr. pp. 136-137.)

In the McCoy-Henig correspondence (See answer to Interrogatory No. 29, Tr. pp. 47-48; Finding 26, Tr. pp. 136-137) the question was even more pointblank and the answer was the same, that there was no provision in the Act for collecting from the insured.

When we consider these statements, the Administrator's letter of April 16, 1941 to the President of the Senate, quoted above, and Mr. Breining's statement to the House Committee on Military Affairs, also quoted above; when we look at the forms, regulations, and official statement to the Armed Forces; and when we also consider that not until March 1, 1943 did any Government official do or say anything publicly indicating a view that the Act imposed an obligation to repay; we are irresistibly impelled to the conclusion that the original administrative construction of the Act was that it imposed no such liability. See *United States v. Nichols,* 105 F. Supp. at 555-556.

3. Administrator's Decision No. 513.

Administrator's Decision No. 513, issued March 1, 1943, (Tr. pp. 56-61) does not do much more than state the problem and announce a conclusion. After stating that the Government's voluntary assumption of its "guarantee of premiums . . . was not a contract right and the United States Government received and asked for no consideration for extending the privilege," the Decision announces that "it is believed" that Section 406 of the 1942 amendments

> "was merely in cognizance of the original common law right plus the specific provision which permits set-off . . ." (Tr. p. 60).

Why this abrupt reversal of the earlier position of the Veterans' Administration? The Decision offers this hint:

> "There exists no question as to any modification of a contract; but in any view the Government's gratuitous assumption of liability conditioned upon the insured's application for the benefits of the Act and the insurer's consent would not constitute such type of agreement as would preclude Congressional action looking toward reasonable safeguarding of the public interest." (Tr. p. 61.)

This seems to say that the already protected insured had no such contractual rights as would prevent Congress from retroactively imposing the liability on him to hold down or eliminate any financial loss to the Government. By parity of reasoning the Administrator was free to reverse his previous interpretation which, it now appeared, was going to cost too much.

4. **Administrator's Decision No. 742.**

While Decision 513 was not given wide circulation (see answer to our Interrogatory No. 3, Tr. pp. 15-17), its correctness was "seriously questioned" and the Administrator undertook a "careful reexamination" of the question in his Decision No. 742 dated April 1, 1947 (Tr. pp. 62-94).

Since the decisions of District Courts on this question which are adverse to appellants' position, including the decision below, have adopted the approach, the basic reasoning and the conclusion of Decision 742, we will discuss this Decision at length.

The new Decision, unlike the old one, gives a surface appearance of being carefully reasoned. However, analysis shows that pertinent provisions of the Act and its amendments are given no attention, that the change in the Government's liability wrought by the amendments and the effect of that change on the claimed liability of the serviceman are completely disregarded, and that the whole structure of the Decision rests on unsupportable premises.

The key conclusion, reaffirming the idea of a common law right to reimbursement, is expressed as follows:

> "Of course, if the insured fails to discharge his obligation to pay the premiums with interest, the Government is required to pay them, but in so doing it is entitled to receive credit to the extent of the cash surrender value of the policy so that the Government is actually out of pocket only that amount which represents an excess of the premiums with interest over the cash-surrender

> value. This, and no more, could the insurer actually compel the insured to pay. Hence, the Government pays only to the extent that the insured could be compelled to do so. Under these circumstances, the Government pays, as guarantor, the insured's obligation and, applying principles of law so well established as to be incontrovertible, the Government has the right to be reimbursed by one whose debt it has paid." (Tr. p. 85.)

a. Major Premise—Insured Liable to Insurer.

If in fact the insurance company could not compel the insured to pay the premiums the Government did not pay *his* debt and the conclusion falls with its premise. It is beyond question that there was no personal liability to pay premiums imposed by appellants' policies (Exhibits 14, 15, 16 and 17, Tr. pp. 275-287) or by insurance policies generally (testimony of Marcus Gunn, Tr. pp. 219-222), prior to protection. Did the act of placing a policy under protection make the insured liable to pay premiums when he was not liable before? Yes, says the Administrator. His argument, with our comments interspersed, is as follows:

> "The right of the insurer to receive the premium payments is absolute, for the protection was afforded and it must be paid for. The amount that must be paid is fixed: it is the total amount of premiums that fall due during the period of protection plus interest from the several due dates." (Tr. p. 84.)

Comment: *Is* the amount fixed? Interest at what rate, and by whom payable? If this refers to what

the Government must pay, is interest at 3% simple per the 1940 Act, or at the policy loan rate per the 1942 amendments? If this refers to what the insured "must" pay, a conclusion is being used to prove itself.

> "The absolute right of the insurer to receive the premium payments necessarily means that someone is obligated to pay them and that the insurer is entitled to look to such person or persons for payment. Primarily, the insurer looks to the insured for payment. That this is so is made plain by the provisions of Section 410 which, in effect, require the insured, within one year after the time when the Act ceases to be in force, to pay all past-due premiums with interest if he desires to continue the insurance." (Tr. p. 84.)

Comment: Section 410 provides that if the insured does not pay past due premiums plus interest within a year of separation, the policy shall lapse. If the insured was to be liable to the insurance company for premium payments, Congress could have said so right here, by requiring the insured to give the company a premium note or by just *saying* that he was thus liable. But, neither Section 410 nor the application forms say anything of the kind. On the contrary, by providing that the consequence of non-payment is lapse of the policy, and failing to list any other consequence, Section 410 "makes it plain" that the insurance company could not compel the insured to pay.

> "It is also made plain by the provisions of Section 409, pursuant to which, if the insured dies while in service, the insurer deducts the premiums, with interest, from the proceeds of the insurance." (Tr. pp. 84-85.)

Comment: How so? The word "if" limits the effect of the Section to what is covered by the "if" clause.

> "And it is made clear by the Act's commitment of the cash surrender value (which, in other circumstances, is ordinarily regarded as the insured's to dispose of as he pleases) to stand for the premiums owing to the insurer." (Tr. p. 85.)

Comment: How so? That the insured's rights in his policy are thus specifically curtailed does not mean that the insurer-insured relationship is otherwise modified.

Has the Administrator proved that the insurance company could successfully *compel* the protected insured to pay the past due premiums if he did not voluntarily pay them within a year after separation? *Would this Court so hold in a suit brought by the insurance company?*

b. Minor Premise—United States a Common Law Guarantor.

Having thus "proved" that the insured was indebted to the insurance company for premiums coming due during the period of protection, the next step is the assertion that when the Government pays the insurance company it pays the debt of another and thus occupies the position of a guarantor at common law. With this goes a characterization of the relationship between insured, insurer and Government as that of principal obligor, obligee and guarantor.

We have just demonstrated that the insured had no obligation to the insurance company. This means

that he was not an obligor at all, unless he is obligated directly to the Government and in that event the relationship would be obligor-obligee, not obligor-guarantor.

Whether the position here occupied by the United States should be characterized as that of a guarantor, a surety, a voluntary indemnitor, or as something apart from any of these familiar categories depends on the facts. What are the facts?

Without request by appellants and on its own initiative Congress enacted the Civil Relief Act wherein the United States proposed and offered to make good (we here avoid using conclusion-forming words like "guarantee" or "indemnify") any loss which insurance companies might suffer by complying with the legal prohibition against lapsing contained in the Act. This proposal was not purely philanthropic. The Government was promoting its own interests; it was removing from the minds of men who had just left their families some of their worries about those families, thus enabling them to be better soldiers. (See Section 100 of the 1940 Act.)

Once the Act was passed, the Government's commitment was irrevocably established. The man who entered the service had the *right* to obtain protection on application. Neither the insurance company nor the Government could refuse him, provided only that his *policy* met the requirements established by the Act. The insured applied to the insurance company, *not* to the Government; and approval by the Government, after receipt of a *copy* of the application, was no more than the performance of a ministerial act,

a clerical determination that the policy met such requirements.

It seems to us that these facts establish that the Government was a voluntary indemnitor within the criteria stated in *Howell v. Commissioner of Internal Revenue,* 69 F. 2d 447, 450, cited, and we believe misapplied, in the *Nichols* case. (105 F. Supp. at 556.)

However, in the final analysis what the Government's position was depends on the contract documents—the 1940 Act itself, the Regulations, the application form and the notice of approval. Nowhere in any of these "documents" is the relationship of principal obligor-guarantor spelled out. To the contrary the limited commitment exacted from the insured is delineated with precision, particularly in the document the insured was asked to sign—the application form. The Government asked for and obtained a lien on the policy, nothing more.

Without a premium note, without any kind of express agreement on the part of the insured to stand personally liable, the Government is in the same position as the mortgagee whose note is barred by limitations, the materialman whose mechanics' lien runs against the property not the property owner, and the life insurance company which makes a policy loan on the sole security of the policy. In fact, the whole approach of the 1940 Act is to treat the unpaid premiums as a policy loan on the sole security of the policy.

Before closing off this guarantor versus indemnitor discussion, we would observe that if the Government's

undertaking was that of a gratuitous indemnitor, or anything of that general nature, it can expect no reimbursement for the gratuity; if its undertaking was contractual in nature, as it would have to be for any right of reimbursement to arise, *it is bound by the contract it has made, and it cannot go outside the writings it prepared for help in adding something it failed or forgot to put there.* This is not a situation where a contract can be implied, in fact *or* in law; we have here an *express* contract carefully delineating terms and conditions, without an ambiguous word or phrase. The most the Government can say is that some things that should have been stated therein were left out, or that the contract is burdensome on the public purse.

c. Jump From Premise to Conclusion.

With his premises thus "established" the Administrator jumps to the conclusion that "the Government has the right to be reimbursed by one whose debt it has paid." This is quite a jump. It completely disregards the fact that the Government's obligation to insurance companies would be determined by the aggregate experience of company-wide groups of policyholders, not by the individual policy. It also overlooks the fact, demonstrated above, that it would be almost impossible to calculate how much the Government had paid on account of any one insured. It ignores subdivision (1) of Section 408 of the 1942 amendments which says that the rights and obligations of the already protected insured are unchanged; and it treats the change in the Government's liability

wrought by subdivision (2) of Section 408, as if it were no change at all.

d. "Support" From Other Portions of the Act.

The administrator claims that the conclusion thus drawn is confirmed by other parts of the Act.

> "Obviously, the lien provision is inconsistent with an assertion that the Government's obligation relates only to the amount by which the premiums and interest exceed the cash surrender value, for if that were true the lien provision would be utterly meaningless since the res, i.e., the cash value of the policy, to which it attaches, would be extinguished before the Government's obligation matures." (Tr. p. 86.)

Comment: Not so. Section 410 preserves the res for the United States by providing that when the policy lapses "The insurer shall thereupon become liable to pay the cash surrender value thereof, if any . . ."

> "So it must be concluded that as to the total amount of the premiums with interest the insured remains the principal obligor and the Government is secondarily liable as guarantor. Hence, there is no basis whatever for an assertion that the insured is the principal obligor for only so much of the total sum as represents the cash surrender value of the policy and that the Government is the principal obligor as to the remainder." (Tr. p. 86; underlining as in Exhibit 18-A.)

Comment: As shown above, the insured is not a principal obligor for anything. True, the insured, by asking for protection authorized the company to apply cash surrender value, but this did not make the

insured a principal obligor, or make him liable to pay premiums, any more than would a policy provision authorizing use of accumulated dividends to pay missed premiums. The authorization to apply cash surrender value was the consideration and *all* of the consideration the insured gave or was asked to give for protection.

> ". . . the fundamental basis of the entire Act is protection of the person in service by temporary moratoria on certain obligations—as contract liabilities, rents, taxes and so forth. As this principle could not apply to insurance premiums payable only voluntarily, the device was adopted of having the Government guarantee such payments upon the insured's application. In effect, the Government became the collecting agent for the insurers; but it is significant that under no circumstances did the Government undertake to <u>assume</u> any liability or obligation, as such, of any person subject to the provisions and benefits of the Act." (Tr. pp. 88-89; underlining as in Exhibit 18-A.)

Comment: Yes, the fundamental purpose of the Act, as stated in Section 100 was to provide temporary moratoria. We thoroughly agree that "insurance premiums payable only voluntarily" can't be reconciled with temporary moratoria on debts. Yes, to avoid subjecting insurance companies to unfair and probably unconstitutional burdens it was necessary for the Government to assure the companies that it would pay the premiums if the insured did not. Period. The rest of the administrator's argument does not follow. *Did* the Government become "the collecting agent for the

insurers?" That is a *question,* not a reason for an answer. How could it become the agent to collect something that was not owed? *Did* the Government undertake to assume any liability or obligation? That the Government assumed a liability is just about the plainest thing in the Act. Whether it assumed an obligation for which the serviceman was also liable is the question, not a "significant" basis for an inference.

e. Appeal to the Equities.

Turning from the language of the Act, the Administrator seeks to buttress his position by arguing:

> "To hold that the insured is not indebted to the Government in such circumstances would produce results so inequitable and falling so unevenly upon those protected under the 1940 Act that the intelligence and sense of fairness of Congress should not be impugned by ascribing to it such an intent unless no other conclusion can be drawn from the language of the Act itself." (Tr. p. 86.)

He then gives several examples of such "uneven" and "inequitable" results: The insured who let his policy lapse after separation would be given free insurance while the insured who died in service paid for his by having the premiums deducted from the proceeds of his policy, and the insured who reinstated would also have to pay the premiums which came due while his policy was protected; the insured whose policy had little or no cash value at the time of protection gets off easier than the insured whose policy had substantial cash value at time of protection; and the insured who obtained protection under the 1940

Act would be unfairly favored over the insured who applied under the 1942 Act. Another "discrimination," suggested in the *Nichols* and *Morton* cases, is that those servicemen who took out National Service Life insurance had to pay premiums on those policies, and that wouldn't be fair if others were given free insurance.

We concede that these considerations, excepting the one involving those protected under the 1942 Act, might have been urged on Congress in 1940 when it was considering the legislation in question. We can only speculate as to what Congressional reaction would have been if they had been urged. There is no evidence that they were urged.

To say that Congress *should* have required such reimbursement because of such considerations is to disregard the *fact* that it did not expressly do so.

To say that Congress *did* so require because of such considerations involves indulgence in a highly unreliable form of inverse reasoning (it should have, therefore it did), which would be justified only if there were *no* indications in the Act itself as to what was intended, and perhaps not then. cf. *United States v. Gilman* 347 U.S. 507, 74 S. Ct. 695, 98 L. ed. 898, discussed at some length below. As we have shown, not only is the silence of Congress on the subject significant in itself, but there are many *positive* indications that Congress did not want to impose the liability in question. Further, with an express contract staring us in the face, there is no basis for adding terms of critical importance by talking about equities.

5. Discussion of the Equities—Including Some Matters Overlooked by the Administrator.

Nothing that we have said above is said with the purpose of avoiding or evading discussion of the equities of this situation. We would like to take a good hard look at the equities right now.

In October, 1940, Congress had just passed the Selective Service Act. Men inducted under that Act could expect to be paid, in the words of the popular song of the time, "Twenty-One Dollars a Day—Once a Month". The Government did not provide allowances for dependents of men in the lower enlisted grades. (The Servicemen's Dependents Allowance Act—Pub. Law 625, 77th Congress—became law June 23, 1942; and by October 1942, the new private was paid $50 per month.) True, as Decision No. 742 takes pains to point out, the nation was not at war in 1940, but there was more than a possibility that it soon would be. The purpose of the Civil Relief Act as stated in Section 100 thereof was "to provide for, strengthen and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States . . ." Men called to service before Pearl Harbor left peaceful and remunerative pursuits when most of their fellow citizens were still enjoying them. In this and other respects, their sacrifices were greater than those of men called after October 1942.

Decision No. 742 correctly points out that men inducted after October 1942 "faced the possibility of early combat duty." But, where were the pre-Pearl

Harbor soldiers and sailors in 1942? On Bataan, at Midway, on Guadalcanal, in North Africa, on the oceans and the battlefields of the world, buying with their blood and with their lives the time needed to bring to bear the manpower and the industrial power of this country. Their early training and their availability were beyond price. They fought when the going was toughest. They fought the longest. Their greater exposure undoubtedly resulted in a higher percentage of casualties.

The invidious comparison made in Decision No. 742 between pre-Pearl Harbor soldiers and those who began their contribution at a later time is unworthy of the great soldier whose signature appears on that Decision, and is less than completely incredible only when we realize that General Bradley did not write the Decision, but only approved an opinion prepared by his solicitor in support of a position taken by General Bradley's predecessor.

When we compare the pay and family allowance situation in 1940 with that in 1942, we find ample reason for a difference in treatment, ample reason for *maintaining* insurance protection for the dependents of those first called to the colors. Further, by 1942 Congress could see that the obligations it had assumed in the 1940 Act involved large amounts of money and could well decide that it did not want to go any further along those lines. In 1940 Congress could well have thought that any loss to the Government would be small. In fact, the entire "difference" shown on final accounting might be covered by cash values and the

Government's profit factor (the difference between policy loan interest and 3%, plus the other factors discussed above) if the percentage of policies allowed to lapse was not too high. If the 1940 Congress knew anything about the experience under the 1918 Act, where the lapse ratio was very low (see Exhibits L and M, Transcript, pp. 305-313), it had reassurance on that point.

What about the "discrimination" between those who let their policies lapse and the beneficiaries of those who died during protection? At the time of application no applicant knew whether he would survive his tour of duty. If he should die the beneficiary named in his policy was going to get a death benefit that would not have existed without protection. At the time of application he was *told* that that would happen, and in his application he expressly agreed that it should happen. On death there is a fund in existence because of the protection, from which full payment can be made without difficulty. Quite different is the case of the man just out of the service. He has no such fund; he is struggling to re-establish himself as a civilian and very likely needs to watch every penny.

If the recently separated man has the cash to reinstate his protected insurance and thereafter pay premiums thereon, he is substantially better off than the man who does not. Under the circumstances it would seem perfectly fair to require the reinstater to pay back premiums as a price of keeping the policy with its inherent values while allowing the non-reinstater to cut his losses and walk away without further penalty.

And what about the "inequity" of giving "free" insurance to appellants and others like them while requiring premiums from all those who took out National Service Life Insurance? Here again difference of treatment is based on difference of circumstance. Congress could well have considered that the private company insurance taken out by the insured prior to putting on the uniform represented the man's own estimate of what his family then needed, apart from any thought of military service; and that it should be maintained, within the $5000 limitation, even if he also could take out National Service Life Insurance. Section 402 of the 1940 Act limited protection to policies taken out at least 30 days before entry into military service. Congress apparently considered that this was all the protection the Government needed against the possibility that insurance would be taken out to take advantage of the "free insurance" provisions of the Act.

Why is it unfair for one insured to apply more cash value than does another toward payment of premiums accruing during protection? When making application the man whose policy already had substantial cash value knew just what he was committing.

In all these cases the Government is putting its finger on the fund, forbidding its alienation, and thus protecting itself as far as it could without requiring a *cash* outlay from a man who had just discharged the most substantial and dangerous obligation of citizenship.

There is more to be said about the equities! Appellants and others in like position have been misinformed and misled to such an extent that it would be most unfair to now require them to pay what the Government claims. Appellants had no reason to believe, when they made their applications for protection, that they were assuming a personal liability. The Act did not say that they were liable nor did the regulations nor the official explanation distributed to the Armed Forces. And on the positive side, they had reason to believe that they were *not* assuming any liability. The public statements of Veterans Administration officials to insurance companies undoubtedly were passed on to their insureds in one way or another. But most important of all, and this is really a matter of contract rather than one of equity, the application form (V. A. Ins. Form 380) prescribed by the Administrator and signed by the applicant defined and limited the insured's obligation and the Government's rights in this language:

> "In consideration hereof, I hereby consent and agree that the United States shall be protected in the amount of any premiums and interest guaranteed on the above numbered policy in the event of its maturity as a claim, or out of the cash surrender value of the policy, at the expiration of the period of protection under the Act." (See Exhibit A, Tr. p. 293.)

The Administrator did not take the trouble to circulate to the Armed Forces any information about his Decision No. 513 and the change of position which it

represented. (Answer to Interrogatory No. 3, Transcript pp. 15-17.) It was not until 1946 when appellants received the Administrator's Form Letter FL 9-63 that they had *any* warning or notice that they would be asked to reimburse the Government for moneys it might lay out.

If a duty to reimburse was imposed by implication of law, and the Veterans Administration knew about it, and if the Veterans Administration thought appellants might not know about it, the Veterans Administration was obliged by Congressional directive to explain matters to them so that they could make their own decisions as to what to do. Having failed to do this, the United States put itself into a position where it should be estopped to assert this liability. If plaintiffs ever were under a burden imposed by the 1940 Act, that burden should now be borne by defendant as a matter of honor as well as a matter of law.

Another consideration going to the equities is this: The Government's position imputes to Congress an unconscionable intent to exact a profit of thousands of dollars from appellants and others similarly situated. If the 1940 system of accounting had been retained, the Government would have profited on *each* protected policy, whether lapsed, reinstated or matured as a claim, to the extent of the difference between policy loan interest and 3% simple interest. With the right of offset claimed and asserted here there would have been no losses worth mentioning.

We think it much more reasonable to assume that the purpose of Congress in incorporating a profit ele-

ment in the Act was to provide an additional fund, beside cash values, to cushion the effect on Government finances.

In any event, use of this fund, accumulated through operation of the monthly difference system, would have cut the Government's payments and thus reduced the liability of appellants to "reimburse the guarantor." In a very real sense then, if appellants were liable, this was a *trust* fund held by the Government for their benefit; and when the Government gave the fund away by giving the insurance companies the option provided in Section 408 (2) of the 1942 amendments, it acted in a manner most prejudicial to the interests of those whom it had assumed to *protect,* and in a manner most unsuitable to a fiduciary.

The argument that an intention to make a gift of public funds should not be imputed to Congress was developed in the judicial decisions. Accordingly this argument will be discussed with the cases under Heading V. G. 2 b, below.

6. Weight to Be Given to Administrative Construction.

As to the weight to be accorded administrative construction, it is pointed out in the Nichols case that Decisions 513 and 742 were inconsistent with the "equivocal" position previously taken on the question, and therefore neither construction can be considered to be "of controlling significance." 105 F Supp. at 555-556. On this point of non-uniform construction see also *Merritt v. Cameron,* 137 U.S. 542, 11 S. Ct. 174, 34 L. ed 772; *Burnet v. Chicago Portrait Co.,* 285

U.S. 1, 52 S. Ct. 275, 76 L. ed. 587; *United States v. Missouri Pacific R.R. Co.,* 278 U.S. 269, 49 S. Ct. 133, 73 L. ed. 322.

Another rule applicable to administrative construction which is pertinent here is that where *reliance* has been placed on a particular administrative construction so that injury would result if that construction were changed, the construction relied on will be given special weight. See *Sanford v. Commissioner,* 308 U.S. 39, 60 S. Ct. 51, 84 L. ed. 20; *Grand Trunk Western R.R. Co. v. United States,* 252 U.S. 112, 40 S. Ct. 309, 64 L. ed. 484; *United States v. Alabama G. S. R. Co.,* 142 U.S. 615, 12 S. Ct. 306, 35 L. ed. 1134.

7. Administrative Construction of the 1918 Act.

The United States has introduced some evidence (Exhibits K, L and M, Tr. pp. 305-313) concerning losses suffered by the Government under the 1918 Act and concerning some efforts made to obtain reimbursement from individuals involved. Some of the facts are noted in Decision No. 742, and the opinion in the *Nichols* case also refers to the 1918 experience.

Some inaccuracies and omissions in the Decision should be noted. First, it is not true as stated in the Decision that collections were made in "at least 14 such cases." Defendant's Exhibits show that only *ten* individuals were involved. Not mentioned in the Decision but clearly inferable from the Exhibits is the fact that no efforts were made to collect from anyone except these ten men. Exhibit K (not printed) shows that nine of the ten (records concerning the tenth man are for some reason not included) were still

in the service when approached and that military pressures were brought to bear on them. Further, the Government has disclosed only part of the picture while refusing to respond to requests for further information. (See Answers to our Interrogatories 17, 18 and 19, Tr. pp. 24-26.)

It is not correct to say, as did Judge Graven in the *Nichols* case, that "the relatively small loss sustained" in the 1918 operation indicates a construction "that the Government was not to bear the expense of such guaranteed premiums." (105 F. Supp. at 555.) To the contrary, Exhibit M shows that the "relatively small loss" was due to the small lapse ratio ($19,-868.07 of premiums on lapsed policies, out of $362,-399.50 in past due premiums guaranteed—just over 5%), and that less than 3% of the Government's "loss" was recovered by administrative action ($484.42 out of $19,868.07).

Whatever else may be said about this fragmentary and "selected" evidence, the important thing here is that there is no showing that this so-called administrative construction was ever brought home to the 1940 Congress so as to have influenced their thinking in the slightest degree. (See Answer to Interrogatory No. 20, Tr. p. 26.)

F. THE CONSTITUTIONALITY OF INCREASING THE AMOUNT OF A LIABILITY.

Assuming liability to repay under the original Act, and that the measure of the liability was to reimburse

the Government for what it might pay an insurance company under the 1940 settlement formula, *could* Congress, without the consent of protected insureds, require them to reimburse the Government for the greater amount which it voluntarily agreed to pay the companies under the 1942 settlement formula?

Here, after all of the imponderables of the situation have been resolved against the serviceman by implying against him the maximum liability that possibly can be implied on any guarantor-reimbursement theory, we come to a question of power. If Congress had the power to increase the liability at all it had the power to increase it to any extent it chose, either for the benefit of the Government or for the benefit of the insurance companies. In this particular case the suggested interpretation of the Act involves *taking the insureds' money and giving it to the insurance companies.*

The mere statement of this proposition brings an immediate reaction: This cannot be—surely our citizens are not to that extent at the mercy of their Congress! It brings the further reaction that no elected representative would think of doing such a thing.

But suppose Congress did intend to increase the liability, and suppose that the law it enacted in 1942 did just that. *Is* there anything in the Constitution that prohibits such action?

Article I, Section 10 of the Constitution proscribing "laws impairing the obligations of contracts" prohibits State Legislatures from increasing the burdens

as well as diminishing the efficiency of contracts. *Columbia Railway etc. Co. v. South Carolina* 261 U. S. 236, 251, 43 S. Ct. 306, 310, 67 L. ed. 629, 636. But this does not answer our question; this prohibition is not binding on the Federal Government.

Is it the law then that the United States, when it is a party to express or implied contracts, may unilaterally modify such contracts as it wills, and that the other party or parties to such contracts have nothing to say about it? No!

> "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States v. Bank of Metropolis,* 15 Pet. 377, 392, 10 L. ed. 774, 779, except that the United States cannot be sued without its consent." *Perry v. United States,* 294 U. S. 330, 352, 55 S. Ct. 432, 435, 79 L. ed. 912, 918.

In *Lynch v. United States,* 292 U.S. 571, 54 S. Ct. 840, 78 L. ed. 1434, the United States had sought to avoid its obligations under certain war risk insurance policies issued during World War I. The Supreme Court refused to countenance this, observing:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. (Citing cases.) When the United States enters into con-

> tract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." (292 U.S. at 579, 54 S. Ct. at 843, 78 L. ed. at 1440.)

Is it any less offensive to due process to make a new contract or increase the burdens of an existing contract without the consent of the other party than it is to abrogate contract rights? The *Columbia Railway* case, supra, firmly said "no" to a fully analogous question under Article I, Section 10.

There is a further answer to our problem to be found in the just compensation clause of the Fifth Amendment. In *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589, 602, 55 S. Ct. 854, 863, 869, 79 L. ed. 1593, 1604, 1611, Mr. Justice Brandeis, speaking for a unanimous Court, said:

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts . . .
>
> "The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has

> taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value . . . As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Is it any less offensive to take from an insured and give to his insurer than it is to take from a mortgagee and give to his mortgagor? The Frazier-Lemke Act had the dubious virtue of taking from the rich and giving to the poor; the Civil Relief Act of 1942, interpreted as the Government would have it, represents an attempt to take from the poor and give to the rich!

We respectfully submit that any attempt by Congress to increase plaintiffs' liability (if any) would be beyond the power of Congress and unconstitutional.

We further submit that it is not necessary for the Court to reach the constitutional question, since there was no liability to be increased.

G. ANALYSIS OF COURT RULINGS ON LIABILITY ISSUE.

1. Decisions Requiring Reimbursement.

An examination of the three cases decided in the Government's favor discloses that the pattern of reasoning follows that in Administrator's Decision No. 742 with some refinements and additions. The principal argument again is this:

The insured by applying for protection was able to keep insurance in force on the strength of the Government's promise to pay if he didn't, and this was a benefit received by him for which he owed the company which had provided the protection. The United States, as guarantor, was required to pay his debts to the company, and under common law principles the United States is entitled to reimbursement. See *United States v. Nichols*, 105 F. Supp. 543 at 556 and 559; *Morton v. United States,* 113 F. Supp. 496 at 500; *Plesha v. United States,* Tr. pp. 116-117.

A second line of argument is that in the absence of a definite Congressional mandate, an intention to make a gift of public funds to a selected group, holders of private life insurance policies, should not be imputed to Congress. Such action would be discsrminatory, favoring this group over others equally worthy; and the whole purpose of the Act was to grant temporary moratoria not to permanently relieve servicemen of their obligations. See *Nichols,* 105 F. Supp. at 558, *Morton,* 113 F. Supp. at 500, Tr. pp. 110-111, 118-119. Expressed in its most positive form by the Court below:

> "In the absence of a definite Congressional mandate, this Court is not prepared to assist in this latest attempt to siphon off some more of this nation's fast-ebbing public fisc." (123 F. Supp. at 597; Tr. p. 119.)

this argument seems to say that as long as Congress didn't expressly exempt protected insureds from liability to reimburse, such liability *was* imposed, regardless of other factors and regardless of what the Act might otherwise provide.

Two additional arguments are suggested in the *Morton* case:

> (1) "Viewing the legislative history in the light of the discussion in the *Nichols* case, it is the present view that the 1942 Act should be construed as a clarification of the 1940 Act rather than as an extension thereof so as to increase or change the obligation of the plaintiff created by his signing Form 380." (113 F. Supp. at 500.)
>
> (2) "The fact that the plaintiff was advised by the letter referred to in Paragraph 5 of the stipulation of the two year extension arising from the 1942 amendment and took advantage thereof by failure to disclaim anything in that connection, has its place in appraising the impact of the 1942 amendment." (113 F. Supp. at 500.)

This last refers to the form letters sent on FL 9-63 advising the addressee that he could withdraw his policy from protection and stating that if he let his policy lapse he would owe the United States whatever he might pay the insurer; and it seems to imply that

even if no obligation was created by the 1940 Act, the failure of the insured to disclaim his application when he received this letter caused the obligation to then arise.

Before proceeding to discuss these arguments we wish to point out that certain facts of crucial significance apparently were not argued, considered or even recognized by the parties or by the Court in either *Nichols* or *Morton*. These include the fact the amount sought to be recovered by the Government has no relation to the amount allocable against the particular insured out of the amount payable by the Government to the insurer under the 1940 Act; and the fact that applying the 1942 payment formula as the measure of the insured's "liability", increased that liability beyond the maximum that the 1940 Act could be considered to have imposed. These facts and their various implications offer, in our view, the key to the door marked "Congressional Intent". We urged these considerations on the Court below, but they were dismissed, without discussion, as having no merit. (Tr. p. 123.) That the considerations so dismissed are of real significance in this controversy is demonstrated by the opinion in *Hormel v. United States,* 123 F. Supp. 806, where they form the basis of the decision denying reimbursement to the Government.

Likewise, our Constitutional point apparently was not raised and certainly is not discussed in either the *Nichols* or *Morton* opinion. The opinion below does not discuss the point although it was argued to the Court.

We further note that many aspects of legislative history outlined above are not mentioned in the *Nichols* opinion, the only one of the three which undertakes a detailed discussion of such matters.

2. Refutation of Reasoning of These Decisions.

a. The Common Law Guarantor Argument.

This argument has been analyzed and answered in our discussion of Administrator's Decision No. 742. Briefly, and by way of summary, our answer is this: The argument rests on unsound premises. The major premise that the insured was indebted to the insurance company, is refuted, inter alia, by Section 410 of the 1940 Act which makes lapse of the policy the only consequence of failure to pay premiums accrued during protection. The minor premise, that the Government occupies the position of a common law guarantor, is an unwarranted assumption. What the relationship is between insured and Government depends on what the Act provides and on what is said in the documents executed by the parties, particularly the application form. If the insured was not liable to the insurer the Government could not be a guarantor of his debt. The Government asked for and received certain security, the equivalent of a policy loan on the sole security of the policy, and no more; and the Government is bound by the contract which it suggested, prepared and entered into.

Further, the conclusion would not follow from these premises, even if they were sound, for it overlooks the fact that what the Government paid the company

and what it claims from the insured, is more than it would have paid under the original contract; which means that it is claiming more than full reimbursement, something a guarantor is not entitled to.

b. The Gift Argument; the Gilman and Hendler Cases.

There can be no question that Congress *could* grant free insurance or free insurance protection to men in the military service. All men who enter the service now get free insurance during their service under the Servicemen's Indemnity Act of 1951 (38 U.S.C.A. Secs. 851-858). See also 38 U.S.C.A. 802(d), which provided insurance for the beneficiaries of certain men who died or were disabled before applying for National Service Life Insurance.

The argument that intention to make a gift of public funds should not be imputed where Congress did not unequivocally *say* it intended to make a gift, is the counterpart of our argument that the intention to impose a liability on one for whose benefit a statute was enacted should not be imputed to Congress where Congress did not *expressly* impose the liability. This seems to present us with a choice: What foot should we put the shoe on? i.e. what inferences are we going to draw from silence? If the Act really is silent (we say it is not), the choice would have to be based on the Court's assessment of the equities involved.

The Court below apparently considered that *all* of the equities were on the Government's side, because it said (123 F. Supp. at 597; Tr. p. 119) that the intention to make such a gift as this would have to be

expressed to be effective. The Supreme Court of the United States in *United States v. Gilman,* 347 U.S. 507, 74 S. Ct. 695, 98 L. ed. 898 weighed the equities of a substantially similar situation in a very different way. When the weighing process was done, it concluded that in view of the "complex of relationships" involved, Congress, not the Court, should make policy. In the face of Congressional silence a unanimous Court declined to imply a common law right of indemnity against the employee whose negligence had cast liability on the United States (under the Tort Claims Act).

We submit that, at the very least, the *Gilman* case requires a searching examination of the "complex of relationships" between the prospective soldier—employee and his Government as of October 1940—a much more searching examination than the Court below considered allowable. We further submit that such an examination, taking into account the factors discussed under Heading V.E. 5, above, will show that the equities in the soldier's favor balance and outweigh the equities in favor of imposing the liability.

We think the *Gilman* case stands for something more: That in situations like this it is up to Congress to do what it thinks necessary to protect the public interest, and that where Congress has not spoken courts should not make policy by relying on guesses as to what Congress might have done or should have done. In such a view the equities in the serviceman's favor would certainly seem to be sufficient to preclude

judicial imposition of a liability such as that asserted here.

These conclusions have been applied to the very question here at issue in *United States v. Hendler,* 123 F. Supp. 383, recently decided by the District Court for the District of Colorado. There the Court, after stating that it would otherwise follow the *Nichols* case, concluded that it could not do so in the face of the *Gilman* case.

It is worth noting that the Court in the *Hendler* case, like the Courts in the *Nichols* and *Morton* cases apparently was not asked to consider and did not consider many of the *positive* indications in the Civil Relief Act of 1940, adverted to above and in the *Hormel* case, that Congress did *not* intend to impose a liability to repay. In this respect, indeed, we have a much stronger case than did the defendant Gilman, for our case is not a case of complete Congressional silence.

c. The Clarification by Amendment Argument.

Section 406 of the amendments does not apply to applications approved before the amendments became effective. By its own terms Section 406 covers "applications approved under the provisions of this article, as amended." Further, Section 408(1) of the 1942 amendments says that no single right or obligation of the previously protected insured was changed; as to him the 1940 provisions remain in full force and effect. Since it does not apply to previous applications, Section 406 of the amendments cannot be

said to clarify anything concerning the meaning of the original Act.

d. The Failure to Disclaim Argument.

Here is something not to be found in Administrator's Decision No. 742. It is clear at the outset that this argument cannot be used against Plaintiff Mabbutt—when he got the letter he terminated protection. What about Plesha and Kern, who did nothing?

The answer is cogently and authoritatively set forth in the *Hormel* case (123 F. Supp. at 817-818). The only thing that we could add is the observation that Plesha and Kern and the others who did not respond to this letter might well have considered that the letter was sent to *them* as the result of a common kind of bureaucratic clerical error—a mistaken assumption that they had applied after October 6, 1942. Or they might have thought that this represented an arbitrary and unwarranted interpretation of the 1940 Act—which it was—that they would challenge at the first opportunity—which they did.

3. Decisions Denying Reimbursement; the Hormel and Hendler Cases.

At various points in this brief we have referred to and quoted from *Hormel v. United States*, 123 F. Supp. 806. We will not repeat those observations here. The *Hendler* case (123 F. Supp. 383) likewise has been discussed above. It does seem appropriate at this point, however, to say again that there *is* authority supporting appellants' position here, authority which accepts and adopts the basic approach to this problem

which we here urge. The *Hormel* and *Hendler* cases are the most recent decisions on "the central question of this litigation". They reach their conclusions despite the previous decisions of competent judges of equal rank. The *Hormel* decision is based on a penetrating analysis of the language and the consequences of the statute it interprets. Both *Hormel* and *Hendler* go into aspects of the problem either not presented or not discussed in the earlier decisions. We submit that the conclusions reached in those two cases are correct and should be followed here.

H. THE OFFSET PROBLEM.

If it be concluded that the Government is entitled to reimbursement, the Government still must prove (1) that it had the right to offset this liability against appellants' National Service Life Insurance dividends, *and* (2) how much it was entitled to deduct from each appellant's dividend. These matters were not discussed in *Nichols* or in *Morton*. The Court below held that the Government had the right to offset but did not discuss our contention that the Government had not proved how much it was entitled to deduct.

1. The Right of Offset.

For many years Congress has made various veterans' benefits exempt from execution. The history of such legislation is briefly set forth in Administrator's Decision No. 742. In 1935 and again in 1940 this exemption was broadened to prevent collection out of such benefits of most claims that the United States

might have against the veteran. The 1940 legislation on this subject became law on October 17, 1940, the same day the Soldiers' and Sailors' Civil Relief Act of 1940 was approved. This law, Section 454a of Title 38, U.S.C. is quoted at length in Appendix F. It prohibits the collection by set-off or otherwise out of any veterans' benefits, including "dividends . . . or other insurance benefits," of any claim of the United States against the veteran "except amounts due the United States by such beneficiary . . . by reason of over-payment or illegal payments made under such laws relating to veterans, to such beneficiary . . ."

The Government seeks to bring itself within the exception. It cannot claim that there has been any "illegal payment," but it does claim in Administrator's Decision No. 742 that there was an "overpayment" when the Government paid the insurance company.

The Administrator's reasoning consists in quoting from a previous Decision (No. 607) the following:

> "It has consistently been held in construing this specific language that anything of value which a veteran secures under color of the laws relating to veterans and to which he is not specifically entitled by such laws is an overpayment within the meaning of the statute . . ." (Tr. p. 92.)

and later observing:

> "As said in Administrator's Decision No. 607, if the Government pays a veteran's obligation pursuant to law and the veteran refuses to pay

> the debt therefrom arising, he is in a very real sense overpaid and there is an overpayment within the meaning of the exemption statute, supra, 38 U.S.C.A. 454(a). Viewed in that light it is clear that the recovery provision of Section 406 is little, if any, more than a recognition of the right which theretofore existed and is a mere clarification of the applicable statutes." (Tr. pp. 93-94.)

Here again it is claimed that Section 406 of the amendments was merely a "clarification" of what the Act had provided all along. The fallacy of such reasoning has been pointed out above. Section 406 by its own terms and by virtue of Section 408(1) does not apply to pre-1942 applicants.

We submit that the fact that Congress found it desirable to include such a provision in the 1942 amendments indicates that there would be no right to offset without a specific provision for it.

We cannot agree that the furnishing of insurance protection was in any sense a "payment" to the insured. The Government did not pay the *insured* anything. While the insurance protection offered by the Civil Relief Act was undoubtedly something "of value" it was something to which the serviceman *was* "specifically entitled" as a matter of right. The right to defer payment of Federal income taxes without interest or penalty was a valuable right conferred by Section 513 of the Civil Relief Act of 1940. The Government "lost" the use of such tax money, and therefore had to borrow more at interest. Was this too an

"overpayment" which would justify later collection of such taxes (or the interest paid by the Government to borrow an equal amount) out of a veteran's disability pension? Could it be argued, on a parity of reasoning with Administrator's Decision No. 742, that *any* outstanding obligation owed the United States which had the remotest connection with veterans' benefits was an "overpayment"? And if this can be done of what use is Section 454a?

Webster's New International Dictionary (2d ed.) defines "overpay" as follows:

> "(verb) to pay too much to or for; to more than pay; to compensate or reward beyond deserts. (noun) Pay in excess."

If in some sense the Government's "guarantee" was a "payment" to the insured, how in the world could it be considered an "overpayment"? In what sense did the Government pay more than it owed, and in what sense did the insured get more than that to which he was entitled?

The trial Court gave two reasons for its approval of the Administrator's position on this subject. First, long-continued administrative construction is entitled to great weight; and second the Government has the same right to offset as any other creditor and this right is not lightly to be disregarded unless unequivocally curtailed by statute. (Tr. p. 122-123.)

On the first point we would observe that until the right of offset postulated in Decision 742 was actually asserted it could not be challenged, and that as soon

as it was asserted it was challenged, in this and other litigation. While Decision 607 represents construction of a few years standing, it is hardly enough to be persuasive here, particularly when we consider the history, the purpose and the very specific language of 38 U.S.C.A. Sec. 454a.

On the second point, Section 454a does "unequivocally curtail" the Government's right of offset. That is its purpose. Its history shows that Congress has been forced to make the law more and more plain to restrain executive officers who are ever willing to find reasons for declining to consider themselves bound by this statute.

2. Proof of the Amount of the Deduction.

Has the Government proved it is entitled to deduct any particular amount from plaintiffs' dividends? If it was entitled to any offset, the burden is on the Government to prove *how much* it was entitled to deduct. 47 Am. Jur. 786, Setoff, Sec. 103.

The point here is simple. If the Government is entitled to any repayment from these plaintiffs, it is entitled to collect on the basis of what they would have been liable for under the system of computation provided under the 1940 Act. Section 408(1) of the 1942 amendments makes it clear that those amendments do not apply to policies already protected so far as the *insured* is concerned. And, as discussed at length above, even without this section it is most doubtful that Congress could have or would have increased the

original liability by applying the computation formula of the 1942 amendments to policies protected under the 1940 Act.

If the Act had not been amended in 1942, the Government, in order to collect anything from these plaintiffs or others in like position, would have had to establish what proportion of the total payment to the insurance company involved was chargeable to each insured. Since the Act was not amended as to policies already under protection, this is just what the Government must do now.

The important thing to note here is that the job of showing what plaintiffs would have been liable for under the 1940 Act formula *has not been done at all.* The Government has offered no proof whatsoever on this point, seemingly being content to rest on the position that what it paid to the insurance company on each individual policy under Section 408(2) of the amendments is what it was entitled to collect from each plaintiff, a position which is completely untenable. Section 408(2) did not apply to plaintiffs, and plaintiffs neither knew of nor consented to the Government's decision to pay the insurance company a larger amount under a different formula.

VI. SUMMARY AND CONCLUSION.

We will summarize our arguments and conclusions in our closing brief.

Dated, Sacramento, California,
February 7, 1955.

Respectfully submitted,
WHITE, HARBER & SCHEI,
Attorneys for Appellants.

(Appendices A, B, C, D, E and F Follow.)

Appendices.

Appendix A

38 U.S.C.A. Section 817:

"In the event of disagreement as to any claim arising under this Act (Sections 801-818, 820-823 of this title), suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title."

38 U.S.C.A. Section 445:

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau (Veterans' Administration) and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia (United States District Court for the District of Columbia) or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled 'An Act to provide for the bringing of suits against the Government of the United States', approved March 3, 1887, and section 10 thereof so far as applicable . . .

"The term 'claim' as used in this section, means any writing which alleges permanent and total dis-

ability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term 'disagreement' means a denial of the claim by the director (Administrator of Veterans' Affairs) or someone acting in his name on an appeal to the director (Administrator) . . ."

Appendix B

TEXT OF ARTICLE IV OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

Sec. 100. In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

Sec. 400. In this article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or

provides insurance under any policy as defined in this article. (Was 50 U.S.C.A. App., Sec. 540.)

Sec. 401. (1) The benefits of this article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Administrator of Veterans' Affairs. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration.

(2) The Veterans' Administration shall issue through suitable military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions of this article and shall furnish forms to be distributed to those desiring to make application for its benefits. (Was 50 U.S.C.A. App., Sec. 541.)

Sec. 402. The benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of $5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were

made and a premium was paid thereon before the date of approval of this Act or not less than thirty days before entry into the military service; but in no event shall the provisions of this article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than 50 per centum of the cash surrender value of the policy. (Was 50 U.S.C.A. App., Sec. 542.)

Sec. 403. The Veterans' Administration shall, subject to regulations, which shall be prescribed by the Administrator of Veterans' Affairs, compile and maintain a list of such persons in military service as have made application for the benefits of this article, and shall (1) reject any application for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section 402; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this article. Said Administration shall immediately notify the insurer and the insured in writing of every rejection or approval. (Was 50 U.S.C.A. App., Sec. 543.)

Sec. 404. When one or more applications are made under this article by any one person in military service in respect of insurance exceeding a total face value of $5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Vet-

erans' Administration shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of $5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said Administration shall immediately notify the insurer and the insured in writing of such selection. (Was 50 U.S.C.A. App., Sec. 544.)

Sec. 405. No policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: *Provided*, That in no case shall this prohibition extend for more than one year after the date when this Act ceases to be in force. (Was 50 U.S.C.A. App., Sec. 545.)

Sec. 406. Within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the date when this Act ceases to be in force every insurance corporation or association to which application has been made as herein provided, for the benefits of this article, shall render to the Veterans' Administration a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month.

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this article, which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default.

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or someone on his behalf in whole or in part during the preceding calendar month.

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Veterans' Administration has, since the date of such report, rejected an application for the benefits of this article. The final sum so arrived at shall be denominated the monthly difference. (Was 50 U.S.C.A. App., Sec. 546.)

Sec. 407. The Administrator of Veterans' Affairs shall verify the computation of monthly difference reported by each insurer and shall, within ten days thereafter, deliver each month to the proper officer of such insurer, a certificate in the amount of the monthly difference certified in respect of each insurer. Such certificate shall be signed by said Administrator

in the name of the United States, shall be in such form as the Administrator shall determine, shall be payable to the insurer within sixty days after the approval of the statement of account, as provided in section 411 hereof, and shall bear interest at a rate to be prescribed by the Secretary of the Treasury, payable with the principal. Such certificate shall not be transferred except with the approval of said Administrator and shall remain with the insurer until settlement is made in accordance with this article. (Was 50 U.S.C.A. App., Sec. 547.)

Sec. 408. The certificate so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained. (Was 50 U.S.C.A. App., Sec. 548.)

Sec. 409. In the event that the military service of any person being the holder of a policy receiving the benefits of this article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the

insurer as premiums paid. (Was 50 U.S.C.A. App., Sec. 549.)

Sec. 410. If the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: Provided, That if the insured is in the military service when this Act ceases to be in force, such lapse shall occur and surrender value be payable at the expiration of one year after the date when this Act ceases to be in force. (Was 50 U.S.C.A. App., Sec. 550.)

Sec. 411. At the expiration of one year after the date when this Act ceases to be in force there shall be an account stated between each insurer and the United States, in which there shall be credited to the insurer the total amount of the certificates held as security under this article, together with accrued interest to the date of the account, and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section 410, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans. (Was 50 U.S.C.A. App., Sec. 551.)

Sec. 412. The balance in favor of the insurer in each case shall be certified by the Administrator of

Veterans' Affairs to the Secretary of the Treasury, who shall pay to the insurer the amount thereof, which is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, upon the surrender by the insurer of the certificates delivered to it from time to time by the Administrator of Veterans' Affairs under the provisions of this article. (Was 50 U.S.C.A. App., Sec. 552.)

Sec. 413. This article shall not apply to any policy which is void or which may at the option of the insured be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium. (Was 50 U.S.C.A. App., Sec. 553.)

Sec. 414. This article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service. (Was 50 U.S.C.A. App., Sec. 554.)

Appendix C

PROFIT FACTOR IN OPERATION OF MONTHLY DIFFERENCE SYSTEM.

If the insurer had ten policies placed under protection in December 1940 each with annual premiums of $50.00 coming due on January 1 of each year and all ten insureds were separated from service December 31, 1944, and allowed their policies to lapse at the end of protection December 31, 1945, and final settlement was made December 31, 1946, the Monthly Difference Reports would have shown the following:

Report for month of	Charges	Credits	Net
January 1941	$500.00	—	$500.00
January 1942	500.00	—	500.00
January 1943	500.00	—	500.00
January 1944	500.00	—	500.00
January 1945	500.00	—	500.00

and certificates, bearing 3% interest, would have been issued to the insurer. On settlement the Government would pay

$500.00 on Certificate #1 plus 3% for 6 yrs. or	$ 590.00
500.00 on Certificate #2 plus 3% for 5 yrs. or	575.00
500.00 on Certificate #3 plus 3% for 4 yrs. or	560.00
500.00 on Certificate #4 plus 3% for 3 yrs. or	545.00
500.00 on Certificate #5 plus 3% for 2 yrs. or	530.00
Total	$2800.00
Cost per insured (1/10 of total).......	280.00

However if one insured died on December 31, 1943; one insured paid his back premiums and policy loan interest at 6% compound on the day of separation, December 31, 1944, and the policy of another insured

had sufficient cash value to cover all unpaid premiums with interest thereon at the policy loan rate at final settlement on December 31, 1946, the Monthly Difference Reports would have shown:

Report for month of	Charges	Credits	Net
January 1941	$500.00	—	$500.00
January 1942	500.00	—	500.00
January 1943	500.00	—	500.00
January 1944	450.00	168.63	281.37
January 1945	400.00	231.75	168.25
On Final Settlement		298.66	(298.66)

and on final settlement the Government would have paid:

$500.00 on Certificate #1 plus 3% for 6 yrs. or	$ 590.00
500.00 on Certificate #2 plus 3% for 5 yrs. or	575.00
500.00 on Certificate #3 plus 3% for 4 yrs. or	560.00
281.37 on Certificate #4 plus 3% for 3 yrs. or	306.69
168.25 on Certificate #5 plus 3% for 2 yrs. or	178.35
Subtotal	$2210.04
Less credit on final settlement	298.66
Total	$1911.38
Cost per insured (1/7th of total)	273.05

Adjustments to these figures for cash surrender values would complicate the computation without affecting the basic result. Application of surrender value would reduce the cost per policy pro tanto, but the difference between charges and credits due to the difference between 3% simple interest and 6% compound interest would remain.

Appendix D

TEXT OF 1942 AMENDMENTS TO ARTICLE IV OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

Sec. 400. As used in this article—

(a) The term "policy" shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 or not less than thirty days before the date the insured entered into the military service. The provisions of this Act shall not be applicable to policies or contracts of life insurance issued under the War Risk Insurance Act, as amended, the World War Veterans Act, as amended, or the National Service Life Insurance Act of 1940, as amended.

(b) the term "premium" shall include the amount specified in the policy as the stipend to be paid by the insured at regular intervals during the period therein stated.

(c) The term "insured" shall include any person in the military service of the United States as defined in section 101, article I, of this Act, whose life is insured under and who is the owner and holder of and has an interest in a policy as above defined.

(d) The term "insurer" shall include any firm, corporation, partnership, or association chartered or authorized to engage in the insurance business and to issue a policy as above defined by the laws of a State of the United States or the United States. (50 U.S.C.A. App. Sec. 540.)

Sec. 401. The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the in-

sured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed $10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of $10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed $10,000, and a policy which affords the best security to the Government shall be given preference. (50 U.S.C.A. App. Sec. 541.)

Sec. 402. Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans' Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall furnish such report to the Veterans' Administration concerning the policy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and effect with respect to such policy. (50 U.S.C.A. App. Sec. 542.)

Sec. 403. The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest. (50 U.S.C.A. App. Sec. 543.)

Sec. 404. No dividend or other monetary benefit under a policy shall be paid to an insured or used to purchase dividend additions while a policy is protected by the provisions of this article except with the consent and approval of the Veterans' Administration. If such consent is not procured, such dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer. No cash value, loan value, or withdrawal of dividend accumulation, or unearned premium, or other value of similar character shall be available to the insured while the policy is protected under this article except upon approval by the Veterans' Administration. The insured's right to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this article. (50 U.S.C.A. App. Sec. 544.)

Sec. 405. In the event of maturity of a policy as a death claim or otherwise before the expiration of the period of protection under the provisions of this article, the insurer in making settlement will deduct from the amount of insurance the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans. If no rate of interest is specifically fixed in the policy, the rate shall be the rate fixed for policy loans in other policies issued by the insurer at the time the policy brought under the Act was issued. The amount deducted by reason of the protection afforded by this article shall be reported by the insurer to the Administrator of Veterans' Affairs. (50 U.S.C.A. App. Sec. 545.)

Sec. 406. Payment of premiums and interest thereon at the rate specified in section 405 hereof becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt

due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law. (50 U.S.C.A. App. Sec. 546.)

Sec. 407. The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. The Administrator of Veterans' Affairs shall report annually to the Congress on the administration of this article. (50 U.S.C.A. App. Sec. 547.)

Sec. 408. (1) The provisions of this article in force immediately prior to the enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 (hereinafter in this section called "such provisions") shall remain in full force and effect with respect to all valid applications for protection executed prior to the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 and all policies to which such applications pertain shall continue to be entitled to the protection granted thereby.

(2) Any insurer under a policy accepted under such provisions shall, subject to the approval of the

Administrator of Veterans' Affairs and upon complete surrender by it to the United States, within ninety days after the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942, of all certificates issued in accordance with such provisions together with all right to payment thereunder, be entitled to the guarantee of unpaid premiums and interest thereon and the mode of settlement for such policies as provided by this article, as amended. The privileges and benefits granted by the foregoing sentence shall be in lieu of the method of settlement, and the requirement for accounts and reports prescribed by such provisions. In the event any such insurer fails to surrender within the said ninety days all such certificates and rights to payment, the accounts, reports, and settlements required to be made by such insurer under such provisions shall continue to be made as required and shall be governed by such provisions. (50 U.S.C.A. App. Sec. 548.)

Appendix E

SUMMARY OF EXHIBITS 7, 8, 9, AND 10.

		Column 1	Column 2	Column 3	Column 4
				Maximum Due, 1940 Act	
Insured	Policy #	Paid to Insurer; Claimed by U.S.	Col. 3, Less One Year of Protection	As of One Year After Separation	On Final Settlement 1/29/49
Plesha	419814	$261.05	$219.61	$185.87	$203.11
Kern	428642	264.36	209.63	160.42	187.21
Kern	395773	67.70	38.21	.84	18.98
Mabbutt	420558	205.75	199.98	171.06	184.20

Column 1 represents unpaid protected premiums plus interest at the policy loan rate, 6% compound, during the period the policies were listed as being under protection. For Plesha and Kern this period ended two years after separation; Mabbutt's policy was withdrawn from protection on February 27, 1947, 14 months after separation.

Column 2 represents the same calculation except that it assumes protection terminated one year after separation.

Column 3 represents unpaid protected premiums plus interest at 3% uncompounded, from the date of protection to one year after separation.

Column 4 represents the same thing as Column 3, except that interest is calculated to January 25, 1949, the assumed final settlement date. It is assumed that the liability of the company to pay cash value (which under Section 410 became payable one year after separation) did not bear interest. If this liability did bear interest and the rate of interest could be supplied, the figures in Column 4 would be reduced by the amount of such interest.

Appendix F

38 U.S.C.A. 454a:

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provision shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. . . .

"From and after the date of approval of this amendatory Act (October 17, 1940) this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary or his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating to veterans, to such beneficiary or his estate or to his dependents as such: Provided, however, That if the benefits be insurance payable by reason of yearly renewable term or of United States

Government life (converted) insurance issued by the United States, the exemption herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: . . ."